Murugappa Chettiar Lakshmanan v Lee Teck Mook

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B02–90 OF 1994
GOPAL SRI RAM, VC GEORGE AND ABU MANSOR JJCA
13 MARCH 1995

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Test to be applied*

Land Law *— Restraints on dealings — Caveats — Removal — Owner's attorney had entered into negotiations to sell land to caveator — Sale and purchase agreement not signed — Whether there was concluded contract — Whether caveator had caveatable interest — National Land Code 1965 s 327(1)*

The appellant, now deceased was the registered proprietor of a piece of land held under CT No 24212, Lot No 2113 in the Mukim of Serendah ('the land'). By a deed dated 1 June 1987, he appointed one Adaikappan Chettiar ('Adaikappan') as his attorney. The power of attorney was registered in the High Court as required by the Powers of Attorney Act 1949 and it did not empower Adaikappan to sell the land. Subsequently, Adaikappan, in consideration of a sum of RM2,000 received by him, issued a document to three persons, one of whom was the respondent. The respondent claimed that the document was an option to purchase the land but the appellant denied this. The respondent's solicitors wrote to Adaikappan concerning the preparation of the sale and purchase agreement, and when they did not receive any response, entered a caveat over the land. The appellant then took out an originating summons seeking an order under s 327(1) of the National Land Code 1965 ('the Code') for the removal of the caveat but the summons was dismissed. The appellant has appealed. The issue to be decided in the appeal was whether the judicial commissioner was right in holding that the respondent's caveat should remain.

Held, allowing the appeal:

(1) In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under s 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

(2) There was no assertion in the application that there was a concluded contract for the sale and purchase of the land. In the absence of such an assertion, it could not be said that the

respondent had a claim to the title to the land. Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat.

(3) The judicial commissioner's judgment revealed that she did not address her mind at all to this aspect of the case. This non-direction amounted to a serious misdirection on her part. Had she adopted the correct approach, she would have concluded that the respondent had no caveatable interest in law. On this ground alone, the caveat was unsustainable and ought to be removed.

Obiter:

Even if the matter had proceeded to the second stage of inquiry, it would not have succeeded as: (i) there was no evidence that the respondent had exercised the so-called option within its duration, saying nothing about his inability to exercise it in his own name without the concurrence of the other two grantees; (ii) there were no terms and conditions on which the sale was to take place; (iii) the application for the entry of the caveat relied entirely on the existence of negotiations for a contract, but in his address, counsel relied on the respondent's alleged exercise of the option; and (iv) the obvious contradiction between the original case made out in the caveat documents and the entirely new case made out during argument, which variance was completely missed by the judicial commissioner when assessing the quality of the evidence and which showed a lack of critical assessment on her part which the law requires a judicial arbiter to undertake in such a case.

[Bahasa Malaysia summary

Perayu, yang kini telah meninggal dunia adalah tuan punya berdafter sebidang tanah yang dipegang di bawah CT No 24212, Lot No 2113 di Mukim Serendah ('tanah itu'). Melalui suatu suratikatan yang bertarikh 1 Jun 1987, beliau telah melantik seorang yang bernama Adaikappan Chettiar ('Adaikappan') sebagai wakilnya. Surat kuasa wakil itu telah didaftarkan di Mahkamah Tinggi seperti yang diperlukan di bawah Akta Surat Kuasa Wakil 1949 dan surat kuasa wakil itu tidak memberi kuasa kepada Adaikappan untuk menjual tanah itu. Kemudiannya, Adaikappan, sebagai balasan untuk jumlah RM2,000 yang telah diterima olehnya, telah mengeluarkan suatu dokumen kepada tiga orang, dan salah satu daripada mereka ialah responden. Responden menegaskan bahawa dokumen itu adalah suatu opsyen untuk membeli tanah itu tetapi perayu menafikan ini. Peguamcara responden telah menulis sepucuk surat kepada Adaikappan berkenaan dengan penyediaan perjanjian jual beli, dan apabila mereka tidak menerima sebarang jawapan, telah memasukkan suatu kaveat ke atas tanah itu. Perayu kemudiannya telah

mengeluarkan suatu saman pemula untuk memohon suatu perintah di bawah s 327(1) Kanun Tanah Negara 1965 ('Kanun itu') untuk membatalkan kaveat itu tetapi saman itu telah ditolak. Perayu telah membuat rayuan. Isu yang perlu diputuskan di dalam rayuan ini adalah sama ada pesuruhjaya kehakiman itu betul apabila memutuskan bahawa kaveat responden seharusnya dibiarkan.

Diputuskan, membenarkan rayuan itu:

(1) Untuk mengekalkan suatu kaveat, seorang pengkaveat mesti terlebih dahulu melalui tiga peringkat: (i) sama ada beliau telah mendedahkan suatu kepentingan boleh kaveat di dalam permohonannya di bawah s 323(1) Kanun itu; (ii) jika beliau telah menunjukkan suatu kepentingan boleh kaveat, jadi sama ada keterangan yang dikemukakan untuk menyokong tuntutannya mendedahkan suatu soalan serius yang perlu dibicarakan; dan (iii) jika kedua-dua soalan itu dijawab dengan memihak kepada pengkaveat, maka sama ada imbangan kemudahan atau keadilan memihak kepada membiarkan kaveat itu berada di dalam daftar sementara menunggu penyelesaian guaman itu.

(2) Tidak ada penegasan di dalam permohonan itu bahawa terdapat suatu kontrak yang terikat untuk jualan dan belian tanah itu. Dengan tiadanya suatu penegasan sedemikian, tidak boleh dikatakan bahawa responden mempunyai suatu tuntutan untuk mendapat hakmilik tanah itu. Sehingga dan kecuali seorang pembeli mempunyai suatu kontrak untuk jualan tanah yang boleh dikuatkuasakan, beliau tidak boleh menuntut hakmilik kepada tanah berdaftar. *A fortiori*, beliau tidak mempunyai suatu kepentingan yang boleh dilindungi oleh pemasukan suatu kaveat.

(3) Penghakiman pesuruhjaya kehakiman itu mendedahkan bahawa beliau langsung tidak menumpukan fikirannya kepada aspek kes ini. Ketidakarahan ini merupakan suatu salah arah yang serius pada pihaknya. Jika beliau telah mengikut pendekatan yang betul, beliau akan memutuskan bahawa responden tidak mempunyai kepentingan boleh kaveat di sisi undang-undang. Atas dasar ini sahaja, kaveat itu tidak boleh dikekalkan dan seharusnya dibatalkan.

Obiter:

Sekalipun perkara ini diteruskan ke peringkat kedua siasatan itu, ia tidak akan berjaya kerana: (i) tidak terdapat keterangan yang menunjukkan bahawa responden telah melaksanakan opsyen yang dikatakan itu di dalam tempohnya, tanpa mengatakan apa-apa tentang ketidakbolehannya untuk melaksanakan opsyen itu di dalam namanya sendiri tanpa persetujuan dua penerima pemberian yang lain itu; (ii) tidak ada terma dan syarat mengenai jualan itu; (iii) permohonan untuk pemasukan kaveat itu bergantung sepenuhnya pada kewujudan rundingan tentang suatu kontrak, tetapi di dalam hujahnya,

peguambela telah bergantung pada pelaksanaan opsyen yang dikatakan itu oleh responden; dan (iv) percanggahan yang nyata di antara kes yang asalnya dinyatakan di dalam dokumen kaveat dan kes yang benar-benar baru dihujahkan yang mana percanggahan itu tidak disedari sama sekali oleh pesuruhjaya kehakiman apabila mentaksirkan kualiti keterangan dan ini menunjukkan suatu kekurangan pentaksiran secara kritis oleh pihak beliau yang perlu diambil oleh seorang penimbangtara kehakiman di sisi undang-undang dalam suatu kes sedemikian.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed) paras 1687–1775; [1989] Mallal's Digest 1084–1090, 1132–1134; [1990] Mallal's Digest 837–845, 883, 896–897; [1991] Mallal's Digest 1318–1328, 1388; [1992] Mallal's Digest 1260; [1993] Mallal's Digest 967–980.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (folld)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)

Legislation referred to

National Land Code 1965 ss 323(1), 327(1)
Powers of Attorney Act 1949

Appeal from: Originating Summons No 24–396–1994 (High Court, Shah Alam)

RR Sethu (*GC Ng* with him) (*RR Sethu*) for the appellant.
YK Leong (*Riza Leong & Partners*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal from the decision of Ranita Hussein JC, given on 15 August 1994, dismissing the appellant's application made by originating summons for the removal of a caveat entered by the respondent against the title to the appellant's land. The appeal was heard on 16 February 1995, and, at the conclusion of argument, it was allowed, indication being given to counsel that written reasons would be given. These now follow.

The facts relevant to this appeal may be shortly stated. Murugappa Chettiar, now deceased, and to whom we shall refer as 'the deceased', is, and was, at all material times, the registered proprietor of all that land held under CT No 24212 for Lot No 2113 in the Mukim of Serendah. Under his hand, by a deed dated 1 June 1987, he appointed one Adaikappan

Chettiar (whom we shall refer to as 'Adaikappan') as his attorney. The power of attorney did not empower Adaikappan to sell the land in question. It was registered with the registrar of the High Court as required by the Powers of Attorney Act 1949. Consequently, anyone who wished to find out what exactly powers Adaikappan had as the deceased's attorney could easily do so by conducting a search at the registry. On 23 April 1992, Adaikappan, in consideration of a sum of RM2,000 received by him, issued a document to three persons. They were the respondent, one Chan Yin Loong and one Nachiappa Chettiar. There is considerable dispute between the parties to this appeal about what this document actually amounts to. The respondent claims it is an option to purchase the deceased's land. The appellant claims that it is not. The conclusion we arrived at and the process by which we reached it make it unnecessary for us to resolve this issue. It is not the critical fulcrum upon which this case turns. We will assume (without deciding) in the respondent's favour and proceed on the basis that the document is an option.

The next event of significance to which attention was drawn is a meeting that took place in late March between Adaikappan and the respondent's solicitor, one Ms Mathilda Chin. The appellant says that at that meeting, Ms Chin handed to Adaikappan a manuscript containing the proposed terms of the sale and purchase. The respondents dispute this. Again, we are spared the task of resolving this issue. We will once more assume, but without deciding the point, that the manuscript did not emanate from the solicitor. For it does not matter to the result.

What actually transpired at that meeting is set out in the affidavit of Ms Mathilda Chin and it is best that we reproduce her evidence. This is what she said in the material paragraphs of her affidavit affirmed on 5 August 1994.

> 3 I wish to state that about late March 1992, one Lee Tek Mook, NRIC No 3318939 together with one Adaikappan s/o Narayanan Chettiar, attorney of L Murugappa Chettiar, came to see me regarding the sale and purchase of a piece of land known as Certificate of Title No 24212, Lot 2113, Mukim of Serendah, District of Ulu Selangor.
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> 4 I was informed by Mr Lee Tek Mook that he wished to purchase this said piece of land from the registered proprietor by his attorney and that in fact there already exist between Mr Lee and the proprietor by his attorney an agreement for the sale and purchase of the said land. In consideration thereof, Mr Lee had paid an earnest deposit of the sum of RM2,000 which the registered proprietor attorney had accepted and acknowledged receipt.
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> 5 I further wish to state that I was instructed by Mr Lee to prepare a formal sale and purchase agreement with regards to the sale of the said land.
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> 6 During this meeting, the registered proprietor's attorney informed me that he will be executing the sale and purchase agreement on behalf of the registered proprietor as he has the power and authority to conduct the sale.

7 In response to the representation by the registered proprietor as aforesaid, I requested to see a copy of his power of attorney. He then showed me a copy which in fact had a clause granting him the power and authority to sell.

8 I verily believe that, in the event that the registered proprietor's attorney did not have the power and authority to sell the said land, I would not have advised Mr Lee to proceed with the sale.

9 Thereafter, I had written to the registered aproprietor's attorney on numerous occasions as regards execution of the sale and purchase agreement in order to complete the sale. However, we received no response from him until 31 April 1993, when we received a letter dated 23 March 1993 from RR Sethu representing the executor and trustee of the estate of the registered proprietor.

Lest it be is thought that they are of our making, we pause to point out that all errors appearing in the affidavit aforesaid are to the credit of the solicitor who settled that document.

Resuming the factual narrative, on 20 April 1992, solicitors for the respondent wrote to Adaikappan a letter which is in the following terms:

Wan Haron Sukri & Nordin
Advocates & Solicitors
20 April 1992

Adaikappan s/o Narayanan Chettiar
Attorney of L Murugiappa Chettiar By hand

Dear Sir

Re: Land held under 24212, Lot 2113, Mukim Serendah, Daerah Ulu Selangor

We refer to the discussion between your goodself and our client namely, Mr Lee Tek Mok held in our office sometime last week. You had agreed to contact Mr L Murugiappa Chettiar who is presently in India on an urgent basis and revert to us with your comments on the terms and conditions stated by our client. As of todate you have yet to revert to us with your further instructions. Please let us have your instructions so that we can proceed to the preparation of the agreement for the sale and purchase of the abovesaid property.

Thank you.

Yours faithfully
—Sgd—

Nothing further was heard in response to this letter. The deceased died in India on 27 April 1992 and on 10 July 1992, the respondent entered a caveat against the title to the land in question. The grounds disclosed in the statutory form for the entry of the caveat are as follows:

(a) Saya telah membayar wang pendahuluan (earnest deposit) sebanyak Malaysian Ringgit dua ribu (RM2,000) sahaja kepada tuanpunya tanah iaitu L Murugappa Chettiar a/l Letchumanan Chettiar sebagai bukti tujuan saya membeli hartanah yang dikenali sebagai CT 24212 Lot No 2113 Mukim Serendah, Daerah Ulu Selangor.

(b) Saya telah mengadakan perbincangan dan perjumpaan dengan wakil (attorney) iaitu Adaikappan s/o Narayanan Chettiar (No K/P 7887303) mengenai terma-terma dan syarat-syarat perjanjian jual beli. Beliau tidak memberi jawapan balas kepada saya walaupun saya serta peguam saya telah manghantar surat-surat kepada wakil (attorney) tuan tanah supaya peguam saya dapat menyediakan perjanjian jual beli untuk ditandatangani oleh kedua-dua pihak.

(c) Sementara menunggu surat perjanjian ditandatangani dan harta tanah dipindahmilik kepada saya, saya memohon supaya kaveat dimasukkan untuk menjaga kepentingan dan hak saya.

Following the entry of the caveat, the respondent, through his solicitors, wrote two letters, the first on 18 November 1992 and the second on 17 February 1993. Both these letters continued to entreat Adaikappan to provide a response to the draft sale and purchase agreement. On 23 March 1993, the appellant's solicitors wrote to the respondent's solicitors. In it they, inter alia, asserted the absence of any concluded contract and called for the withdrawal of the caveat. The respondent having provided no answer to this letter, the appellant took out an originating summons seeking an order under s 327(1) of the National Land Code 1965 ('the Code') for the removal of the caveat. That summons was scheduled to be heard on 4 July 1994, but was eventually heard and disposed of on 15 August 1994. As we observed at the outset, it was dismissed by the learned judicial commissioner. In the meantime, on 4 August 1994, the respondent filed a suit for the enforcement of the alleged contract he had with the respondent.

Based on these facts, there is only one issue that falls to be decided in this appeal, namely, whether the learned judicial commissioner was right in holding that the respondent's caveat should remain against the title of the land in question.

In the resolution of this issue, reference may be made to the recent decision of this court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* Civil Appeal No W–02–38–94, yet unreported [since reported in [1995] 1 MLJ 719]. We there attempted to collect some of the relevant authorities and to restate the law on the subject. In particular, we enumerated the three steps or stages through which a caveator must pass in order to sustain his caveat. We do not propose to repeat what was said in that case with regard to interests that are caveatable and to the approach that a court should take when deciding whether a caveat should remain or be removed.

The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of

justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

With these matters in mind we now turn to address ourselves to the first step of the inquiry that has to be undertaken. To recapitulate, the grounds that the respondent asserted in his application in order to lay claim to the title to the land are: (1) that he paid an earnest deposit of RM2,000; (2) that he had had discussions and meetings with Adaikappan on the terms and conditions of the sale and purchase agreement; (3) that Adaikappan had not responded to letters written by the respondent and his solicitor for the preparation of the sale and purchase agreement; and (4) that the caveat is being entered pending the execution of that agreement and the transfer of the property to him.

Now, it is clear that nowhere in the application is there an assertion of a concluded contract for the sale and purchase of the land in question. In the absence of such an assertion it cannot be said that the respondent has a claim to the title to the land.

It is axiomatic that negotiations for a contract, however advanced, do not amount to a contract. In *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at p 763, Edgar Joseph Jr SCJ, when delivering the unanimous decision of the Supreme Court, summarized the law in words which express so well our own views on the matter that we find it unnecessary to go much further than to quote them:

> To emphasize the point, it was pointed out that the draft master agreement prepared by Messrs Rashid & Lee, solicitors for MMCB, sometime in 1986, had not been signed as the parties could not agree on the terms thereof.
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> On behalf of the plaintiff, it was submitted that all essential terms had been agreed, the parties had intended to assume and had assumed presently enforceable obligations, and that all that remained to be done was to put these terms into the form of a contract. The defendant's contention requires reading the words 'subject to contract' into the letter of 19 September 1984, when they are in fact not there — so it was said.
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> Broadly stated, the result of this appeal depends upon the answer to the question whether, having regard to the circumstances outlined above, the letter of 19 September 1984 embodies any contractual obligations between the parties.
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> In *Smith v Hughes* (1871) LR 6 QB 597; [1861–73] All ER Rep 632 it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them.
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> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? *The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.* (Emphasis added.)

Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has

no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

A careful reading of the learned judicial commissioner's judgment reveals that she did not address her mind at all to this aspect of the case. In fact, nowhere in her judgment is there any reference to the grounds relied upon by the respondent in his application in Form 19B; and this despite a sustained submission on the point by Encik Sethu of counsel who appeared for the appellant both on the appeal and in the court below. This non-direction by the learned judicial commissioner amounts to a serious misdirection on her part. Had she adopted the correct approach, we are certain that she would have entertained no difficulty in concluding, as we did, that the respondent had no caveatable interest in law. In our judgment, on this ground alone the caveat is unsustainable and ought to be removed.

It follows that there is no necessity to proceed any further to consider the other two stages of the inquiry. But we are confident that in the unlikely event of the matter having proceeded to the second stage of the inquiry, it would most certainly have met its doom there. There are compelling reasons for this conclusion.

Firstly, upon the assumption made in the respondent's favour that the document dated 14 March 1992 is an option, there is not a shred of evidence to show that the respondent had exercised it within its duration. And in fairness to Encik YK Leong of counsel for the respondent, he frankly conceded that there was no letter from the respondent indicating that he was exercising the option. We say nothing, of course, of his inability to exercise it in his own name without the concurrence of the other two grantees.

Secondly, when the affidavit of the attending solicitor, Ms Mathilda Chin is carefully read, it is noteworthy that there is not a word in it about any of the terms and conditions on which the sale was to take place. All she had at best were instructions to prepare an agreement which may or may not be executed by the parties, depending upon whether they agreed to the terms therein. Her evidence, even when looked upon with a most indulgent eye, does nothing to advance the respondent's case any further from the hopeless position in which it stands.

Lastly, the respondent's case does not stand up to the minute scrutiny which the law requires to be undertaken at the second stage of curial inquiry. It will be recalled that the Form 19B relied for caveatability entirely upon the existence of negotiations for a contract. Yet, in his address to us, Encik Leong said that he was relying upon the exercise by the respondent of the option in question to sustain his client's right to caveat the appellant's land. As to the merits of that argument, we have already pointed out the absence of evidence to show any exercise of the option.

But of equal importance is the obvious contradiction between the original case made out in the caveat documents and the entirely new case made out during argument both before the learned judicial commissioner

and this court. This variance was completely missed by the learned judicial commissioner when she came to assess the quality of the evidence presented to her. In our judgment, upon the assumptions made in the respondent's favour, there was lacking, in the court below, that critical assessment which the law requires a judicial arbiter to undertake in a case such as the present.

The reasons which we have given make it unnecessary to proceed to the third and final stage of the inquiry to determine where the justice of the case lies.

In the light of all that we have said, it was crystal clear that the caveat ought not to be allowed to remain. Accordingly, the appeal was allowed and an order in terms of the appellant's summons made. The respondent was also ordered to bear the costs of this appeal and the costs in the court below. The deposit was ordered to be refunded to the appellant.

Appeal allowed.

Reported by Anne Khoo